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PROCESSING EVIDENCE AND DRAFTING JUDGMENTS IN INTERNATIONAL CRIMINAL TRIAL CHAMBERS

ABSTRACT. International criminal trials are usually very complex, lengthy and heavy on evidence. This complicates the Trial Chamber's fact finding task and hampers its ability to issue a reasoned written judgment without undue delay. The present article examines the specific challenges of drafting an international criminal trial judgment, with the main focus being on mastering the huge amounts of evidence. It further provides practical recommendations on how to deal with these challenges.

I INTRODUCTION

While much has been written on the admission of evidence in international criminal trials, what to do with the evidence once it has been admitted is virtually unexplored. The International Criminal Tribunal for the former Yugoslavia (ICTY) has recently capitalized on its experience to offer the first general discussion on how to draft international criminal trial judgments.[1] The present article offers a series of proposals on how to further develop those recommendations. It will focus on the most important and most difficult part of judgment drafting – mastering the evidence.[2] The typically huge size

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[1] ICTY & United Nations Interregional Crime and Justice Research Institute, *ICTY Manual on Developed Practices* (Turin: UNICRI Publisher, 2009) 109–125 (Chap. IX, 'Trial Judgement Drafting').

[2] On the drafting of other, generally less difficult, parts of the judgment, see *ICTY Manual* (n. 1 above).

of international criminal cases makes it impossible to master the evidence without some intermediary step between receiving it and issuing the judgment. This intermediary step is the processing of the evidence, which means organizing it in a way that provides a reliable and manageable basis for drafting the judgment.

Drafting an international criminal trial judgment is a long-term group project. The responsibility lies with a Trial Chamber, consisting of a bench of judges who are supported by legal assistants.[3] The judges will delegate certain tasks to their legal assistants, as permissible under their judicial responsibilities. This may include drafting so long as all decision-making rests firmly in the hands of the judges.[4] The proposals contained in the present article can accommodate a number of variations with regard to how the work is divided. Consequently, it will often refer to the Trial Chamber as such, without distinction between judges and legal assistants. It is submitted, however, that the judges will realistically need to rely on their legal assistants to do the ground work of processing the enormous amounts of evidence.[5] Thus, it is usually best for the judges to focus on hearing and reading all the evidence, deliberating, reviewing and revising drafts, and of course making all judicial decisions, while the legal assistants perform research, draft and present proposals to the judges. Some recommendations below will reflect this model of division of labour.

Many factors influence how a trial judgment ought to be drafted. The allegations in the indictment place boundaries for what evidence is relevant and set out the framework in which to analyse it. This article will focus on the most challenging, and increasingly common, scenario of an indictment containing many complex factual and legal allegations. The approach to judgment drafting also depends on whether a trial is run according to an adversarial, inquisitorial or mixed model. For instance, in an adversarial trial strictly driven by the prosecution's case theory, the final arguments of the prosecution

[3] See PM Wald, 'Running the Trial of the Century: The Nuremberg Legacy' (2006) 27 Cardozo Law Review 1559, at 1567–1570.

[4] See H Thirlway, 'The Drafting of ICJ Decisions: Some Personal Recollections and Observations' (2006) 5 Chinese Journal of International Law 15, at 20–23; PM Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court' (2001) 5 Washington Journal of Law and Policy 87, at 93. See also Wald (n. 3 above) 1569, 1590, 1595.

[5] *ICTY Manual* (n. 1 above) 116. See also Thirlway (n. 4 above) 22–23.

would set limits for the reasoning of the judgment. In international criminal law there are generally good reasons to prefer a predominantly adversarial model in which the Trial Chamber nonetheless retains an active role, including by examining or calling witnesses.[6] The remainder of this article will be premised on an adversarial trial in which the Trial Chamber retains some autonomy with regard to the presentation of evidence and the parties' case theories.

How then should a Trial Chamber process the evidence and draft a judgment? This article will examine the particular challenges it is likely to face, before turning to practical recommendations on how to deal with them.

II THE CHALLENGES OF DRAFTING INTERNATIONAL CRIMINAL JUDGMENTS

This section will first describe some challenges of international criminal trials that set them apart from domestic trials. It will then examine the ensuing implications for evidence processing and judgment drafting in international criminal trials.

2.1 *Distinctive Challenges of International Criminal Trials*

International criminal trials are usually very complex and heavy on evidence. As a consequence, they are also very lengthy. This complicates the Trial Chamber's fact-finding task and its obligation to issue a reasoned written judgment.

2.1.1 *Complexity of Cases and Amount of Evidence*

International criminal cases tend to be much bigger and more complex than domestic ones.[7] Most international criminal indictments are very broad in their scope.[8] They frequently combine allegations

[6] See e.g. NA Combs, *Fact-Finding Without Facts* (Cambridge: Cambridge University Press, 2010) 302–321; I Bonomy, 'The Reality of Conducting a War Crimes Trial' (2007) 5 Journal of International Criminal Justice 348, at 348–355.

[7] *ICTY Manual* (n. 1 above) 119, 121–122; C Gosnell, 'The Changing Context of Evidential Rules' in K Khan, C Buisman, and C Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010) 214, at 220–221; P Murphy, 'No Free Lunch, No Free Proof' (2010) 8 Journal of International Criminal Justice 539, at 540–541.

[8] A Eser, 'The ''Adversarial'' Procedure: A Model Superior to Other Trial Systems in International Criminal Justice?' in T Kruessmann (ed), *ICTY: Towards a Fair Trial?* (Wien: Intersentia, 2008) 207, at 212–213, 215.

against multiple accused, holding high positions and controlling various armies, rebel groups, administrations, etc. Indictments commonly allege that they and their subordinates were active for long periods of time in large or different areas, in which numerous crimes were committed. Some of these crimes may be particularly complex.[9] In order to show that they qualify as international crimes within the jurisdiction of the international court or tribunal, it may be necessary to prove that they were committed in the context of an armed conflict or an attack on a civilian population. Complex theories of liability such as joint criminal enterprise or superior responsibility are commonly alleged to try to link the crimes to the high-ranking accused. Such indictments hold the potential for a flood of evidence.

That potential is usually fulfilled. The parties rarely manage to agree on basic facts or narrow the issues in dispute.[10] As a result, the prosecution must call many witnesses and tender numerous exhibits to prove its case.[11] Because of the difficulties of investigating international crimes, the prosecution may not always have access to the best evidence and may need to compensate by bringing evidence of a less direct nature.[12] Given the high profile and symbolic importance of international criminal cases, the prosecution is likely to overcompensate at the risk of tendering redundant evidence.[13] Not knowing what evidence the defence will bring, the prosecution will in any event want to set out its case as fully as possible.[14] The defence may adduce plenty more evidence to rebut some or all of the prosecution's case and to offer the judges a different perspective than the one contained in the indictment.[15] All parties tend to err on the side of tendering too much evidence as they cannot be certain what

[9] Such as the crime against humanity of persecution, or forcible transfer by creating an environment where there is no choice but to leave.

[10] Gosnell (n. 7 above) 223; A Whiting, 'The ICTY as a Laboratory of International Criminal Procedure' in B Swart, A Zahar, and G Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011) 83, at 100.

[11] *ICTY Manual* (n. 1 above) 119; Eser (n. 8 above) 213; Gosnell (n. 7 above) 214, 223.

[12] Whiting (n. 10 above) 86. In particular, direct evidence linking the high-level accused to the crimes is generally scarce, leaving much to be laboriously proven by circumstantial evidence – see Gosnell (n. 7 above) 221, 223.

[13] Whiting (n. 10 above) 96, 100–101.

[14] Eser (n. 8 above) 219; Whiting (n. 10 above) 100–101.

[15] Eser (n. 8 above) 215–216; Gosnell (n. 7 above) 223.

evidence the judges may find admissible or give weight to in the judgment.[16]

The parties' efforts to adduce evidence are facilitated by the permissive rules on admissibility. In most cases a Trial Chamber may admit evidence if it is relevant and probative,[17] including hearsay evidence.[18] Professional judges typically do not see any need to shield themselves from evidence that could be prejudicial if provided to a jury, such as hearsay evidence on the acts and conduct of the accused.[19] With a broadly framed indictment, a Trial Chamber may not immediately discern the relevance of a specific document or line of questioning, especially if it would need to be interpreted in conjunction with other evidence yet to be tendered.[20] In practice, all this has led many Trial Chambers to establish a low threshold for the admission of evidence.[21] As a result, the evidence can easily amount to tens of thousands of transcript pages in addition to tens of thousands of exhibit pages. In the *Popović and others* case, for instance, more than 58,000 exhibit pages, not counting translations, were

[16] Eser (n. 8 above) 213–216; Gosnell (n. 7 above) 222–223; Whiting (n. 10 above) 90–91, 95.

[17] Rome Statute of the International Criminal Court (1998) 2187 UNTS 90, Art. 69 [hereinafter ICCSt.]; Assembly of States Parties to the Rome Statute of the International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 (2002), Rule 63(2) [hereinafter ICC RPE]; ICTY, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.47 (2012), Rule 89(C) [hereinafter ICTY RPE]; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (2009), Rule 89(C) [hereinafter ICTR RPE]; Special Court for Sierra Leone, Rules of Procedure and Evidence (adopted on 16 January 2002, as amended on 31 May 2012), Rule 89(C) (not mentioning probative value) [hereinafter SCSL RPE]; Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL/BD/2009/01/Rev. 4 (2012), Rule 149(C) [hereinafter STL RPE].

[18] *Prosecutor v. Aleksovski* (Decision on Prosecutor's Appeal on Admissibility of Evidence) IT-95-14/1-AR73 (16 February 1999) § 27; *Prosecutor v. Brima and others* (Decision on Joint Defence Motion to Exclude All Evidence from Witness TF1-277 pursuant to Rule 89(C) and/or Rule 95) SCSL-04-16-PT (24 May 2005) § 12.

[19] *Prosecutor v. Tadić* (Decision on Defence Motion on Hearsay) IT-94-1-T (5 August 1996) § 17; *Prosecutor v. Norman and others* (Fofana – Appeal Against Decision Refusing Bail) SCSL-04-14-AR65 (11 March 2005) § 26; Whiting (n. 10 above) 93–94. But see G Boas et al., *International Criminal Procedure – International Criminal Law Practitioner Library Series* (vol III, Cambridge: Cambridge University Press, 2011) 336–337; Murphy (n. 7 above) 545–547, 551, 556–557.

[20] Eser (n. 8 above) 214; Gosnell (n. 7 above) 227; Whiting (n. 10 above) 94.

[21] Boas et al. (n. 19 above) 338–343; Whiting (n. 10 above) 90–95. But see Gosnell (n. 7 above) 223–227. See also criticism by Murphy (n. 7 above) 539–573.

admitted into evidence at trial, and the trial hearings covered more than 34,000 transcript pages.[22] The evidence relevant to any given topic may be spread out over numerous different exhibits and witness testimonies. In addition, the evidence can accumulate rapidly, in particular when court time is saved through the admission of written testimony.[23] The problem then becomes how to properly assess and weigh all that evidence.[24]

2.1.2 *Length of Proceedings*

It takes many months if not years for a Trial Chamber to hear all the witnesses in an international criminal trial.[25] The trial phase of the *Prlić and others* case, for instance, lasted over 4 years.[26] Still, the Trial Chamber must ensure a fair and expeditious trial[27] and uphold the right of the accused to be tried without undue delay.[28] In an effort to save time, the Trial Chamber would ideally issue its judgment shortly after the close of evidence.[29] In practice, that is almost never possible.

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[22] IT-05-88-T. The figures are based on an electronic search.

[23] See, e.g., Rule 92*bis*, *ter*, *quater* and *quinquies* ICTY RPE. At the ICTY, a gradual shift from a preference for live testimony towards a preference for written testimony has reduced the number of court hours necessary for a given case, but at the cost of steeply increasing the amount of written evidence that needs to be processed in an equivalent or lesser amount of time.

[24] Boas et al. (n. 19 above) 338–350, 373–374; Murphy (n. 7 above) 540, 543–544, 551–552, 570, 573; Whiting (n. 10 above) 95.

[25] See Eser (n. 8 above) 212–220; Murphy (n. 7 above) 541–542; Whiting (n. 10 above) 95–97.

[26] The trial phase of this case, IT-04-74, began on 26 April 2006 and ended on 17 May 2010. See http://www.icty.org/x/cases/prlic/cis/en/cis_prlic_al_en.pdf accessed 30 January 2012.

[27] Art. 64(2) ICCSt.; Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Art. 20(1) [hereinafter ICTYSt.]; Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Art. 19(1) [hereinafter ICTRSt.]; Rule 26*bis* SCSL RPE; Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757 (2007), Art. 21(1) [hereinafter STLSt.]; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (Cambodia), as amended by NS/RKM/1004/006 (2004), Art. 33 [hereinafter ECCCSt.].

[28] Art. 67(1)(c) ICCSt.; Art. 21(4)(c) ICTYSt.; Art. 20(4)(c) ICTRSt.; Statute of the Special Court for Sierra Leone (16 January 2002), Art. 17(4)(c) [hereinafter SCSLSt.]; Art. 16(4)(c) STLSt.; Art. 35(c) ECCCSt.

[29] Rule 142(1) ICC RPE explicitly states that the Trial Chamber must pronounce its decision within a reasonable period of time after it retires to deliberate.

While the evidence is being presented, some of the Trial Chamber's attention is consumed by motions and procedural matters. At the close of evidence, the Trial Chamber may well face a backlog of unprocessed evidence. Even if it does not, it will still need time to process the most recently received evidence, and weigh the totality of the evidence.[30] In most cases, it will take months if not years before the Trial Chamber can issue its judgment.[31]

The length of the proceedings introduces a number of complications for the Trial Chamber. It is very difficult for the judges, considering the limits of normal human memory, to correctly recall all of the massive amounts of evidence received over such a long period.[32] One might expect, in particular, a weaker recollection of evidence that is of a technical nature, not particularly distinct, received after a certain routine sets in, and not so recent for it to be fresh in memory. There is a risk of overlooking important connections between evidence received several months or even years apart. The judges must make sure to keep an open mind even after many months of forming impressions based on prior evidence.[33] Finally, the longer the trial lasts, the greater is the risk that it becomes necessary to replace a judge on the bench, as happened in the *Slobodan Milošević* case.[34] Staff turnover is much faster, and in the lengthiest trials it is common that hardly any of the original legal assistants remain at the end of the case. All of this threatens the Trial Chamber's institutional memory and grasp of the evidence. The Trial Chamber must manage to keep these threats at bay without causing too many further delays.

2.1.3 *Transparent Judicial Fact-Finding*

Unlike criminal trials in many domestic legal systems, in international criminal trials the fact-finding is done by judges rather than juries.

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[30] See n. 39 below. See also Rule 142 ICC RPE; Rule 87 ICTY RPE; Rule 87 ICTR RPE; Rule 87 SCSL RPE; Rule 148 STL RPE.

[31] The amount of time between the close of proceedings and judgment day depends on many factors, including the complexity and size of the case. Nevertheless, it is difficult to justify a delay of several years. See *Prosecutor v. Bizimungu and others* (Trial Judgment) ICTR-99-50-T (30 September 2011), Partially Dissenting Opinion of Judge Emile Francis Short, § 3.

[32] PM Wald, 'Rules of Evidence in the Yugoslav War Tribunal' (2003) 21 Quinnipiac Law Review 761, at 771–772. See also Murphy (n. 7 above) 552.

[33] See RS Nickerson, 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 Review of General Psychology 175, at 193–194, 210.

[34] In this case, IT-02-54, judge Bonomy replaced judge May in the course of the trial. See Rules 15*bis* and 15*ter* ICTY RPE.

While a jury pronounces its verdict without explaining how it reached its conclusions,[35] an international Trial Chamber must issue a reasoned written judgment,[36] providing transparency and potentially exposing shortcomings.[37] The reasoning must be sufficient to allow the parties to usefully exercise their right of appeal and enable the Appeals Chamber to understand and review the Trial Chamber's findings as well as its evaluation of the evidence.[38] The Trial Chamber should render its reasoned opinion on the basis of the entire body of evidence.[39] The need to show that it properly evaluated all the evidence and did not disregard any particular piece of evidence,[40] in practice incites the Trial Chamber to refer to the bulk of the evidence, which inflates the size of the judgment.[41] This makes for a colossal task, the difficulty of which increases dramatically with the quantity of evidence.[42]

In these circumstances, it is not surprising that Appeals Chambers have sometimes found fault with how a Trial Chamber handled the evidence. Among the issues that could be ascribed to the considerable difficulties involved in processing the evidence, Appeals Chambers have found that Trial Chambers distorted the evidence;[43] did not

[35] See *Taxquet v. Belgium* (Judgment), Grand Chamber of the European Court of Human Rights (2010), No. 926/05, § 90.

[36] Art. 74(5) ICCSt.; Art. 23(2) ICTYSt.; Rule 98*ter* (C) ICTY RPE; Art. 22(2) ICTRSt.; Rule 88(C) ICTR RPE; Art. 18 SCSLSt.; Rule 88(C) SCSL RPE; Art. 23 STLSt.; Rule 168 (B) STL RPE; Extraordinary Chambers in the Court of Cambodia, Internal Rules (Rev.8) (2011), Rule 101 [hereinafter ECCC RPE].

[37] Boas et al. (n. 19 above) 378; P Roberts, 'Why International Criminal Evidence?' in P Roberts and M Redmayne (eds), *Innovations in Evidence and Proof – Integrating Theory, Research and Teaching* (Oxford: Hart Publishing, 2007) 347, at 373–377.

[38] *Prosecutor v. Hadžihasanović and Kubura* (Appeals Judgment) IT-01-47-A (22 April 2008) § 13.

[39] *Prosecutor v. Halilović* (Appeals Judgment) IT-01-48-A (16 October 2007) § 128.

[40] *Ibid.*, at §§ 122–123; *Prosecutor v. Kvočka and others* (Appeals Judgment) IT-98-30/1-A (28 February 2005) § 23.

[41] See also Boas et al. (n. 19 above) 376–379.

[42] *ICTY Manual* (n. 1 above) 119; Murphy (n. 7 above) 552.

[43] *Prosecutor v. Blaškić* (Appeals Judgment) IT-95-14-A (29 July 2004) §§ 330–332; *Prosecutor v. Brđanin* (Appeals Judgment) IT-99-36-A (3 April 2007) § 125; *Prosecutor v. Galić* (Appeals Judgment) IT-98-29-A (30 November 2006) §§ 324, 385; *Prosecutor v. Kordić and Čerkez* (Appeals Judgment) IT-95-14/2-A (17 December 2004) §§ 903, 917, 1013; *Prosecutor v. Limaj and others* (Appeals Judgment) IT-03-66-A (27 September 2007) §§ 292–294; *Prosecutor v. Kalimanzira* (Appeals Judgment)

sufficiently examine and discuss the relevant evidence;[44] made findings without citing evidence in support,[45] without citing sufficient evidence in support,[46] or without being clear enough about which specific evidence it relied on;[47] relied on a document that was not in evidence;[48] did not make important or necessary

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Footnote 43 continued
ICTR-05-88-A (20 October 2010) § 178; *Prosecutor v. Kamuhanda* (Appeals Judgment) ICTR-99-54A-A (19 September 2005) § 185; *Prosecutor v. Muhimana* (Appeals Judgment) ICTR-95-1B-A (21 May 2007) §§ 122, 127; *Prosecutor v. Munyakazi* (Appeals Judgment) ICTR-97-36A-A (28 September 2011) § 92; *Prosecutor v. Nahimana and others* (Appeals Judgment) ICTR-99-52-A (28 November 2007) §§ 429–431; *Prosecutor v. Nchamihigo* (Appeals Judgment) ICTR-2001-63-A (18 March 2010) §§ 111, 245; *Prosecutor v. Ntakirutimana and Ntakirutimana* (Appeals Judgment) ICTR-96-10-A and ICTR-96-17-A (13 December 2004) §§ 243–244; *Prosecutor v. Ntawukulilyayo* (Appeals Judgment) ICTR-05-82-A (14 December 2011) §§ 55–57, 139; *Prosecutor v. Renzaho* (Appeals Judgment) ICTR-97-31-A (1 April 2011) § 509; *Prosecutor v. Rutaganda* (Appeals Chamber) ICTR-96-3-A (26 May 2003) § 157; *Prosecutor v. Zigiranyirazo* (Appeals Chamber) ICTR-01-73-A (16 November 2009) §§ 47–51, 65–67, 73.

[44] *Blaškić* (Appeals Judgment) (n. 43 above), §§ 529–530; *Galić* (Appeals Judgment) (n. 43 above) §§ 267–268; *Hadžihasanović* (Appeals Judgment) (n. 38 above) §§ 261–265; *Halilović* (Appeals Judgment) (n. 39 above) §§ 122–124; *Prosecutor v. Haradinaj* (Appeals Judgment) IT-04-84-A (19 July 2010) §§ 134, 226, 243, 253–254; *Prosecutor v. Kupreškić and others* (Appeals Judgment) IT-95-16-A (23 October 2001) §§ 140–163, 179, 218, 222–225; *Limaj* (Appeals Judgment) (n. 43 above) §§ 87–88; *Prosecutor v. Bikindi* (Appeals Judgment) ICTR-01-72-A (18 March 2010) §§ 172–178; *Kalimanzira* (Appeals Judgment) (n. 43 above), §§ 175, 178, 183, 185; *Prosecutor v. Karera* (Appeals Judgment) ICTR-01-74-A (2 February 2009) § 177; *Prosecutor v. Muvunyi* (Appeals Judgment) ICTR-2000-55A-A (29 August 2008) § 144; *Nchamihigo* (Appeals Judgment) (n. 43 above), §§ 274, 310–312, 351–354; *Ntakirutimana* (Appeals Judgment) (n. 43 above) §§ 201–202; *Prosecutor v. Simba* (Appeals Judgment) ICTR-01-76-A (27 November 2007), §§ 153–155; *Zigiranyirazo* (Appeals Judgment) (n. 43 above) §§ 44–46, 66–72.

[45] *Blaškić* (Appeals Judgment) (n. 43 above) § 518; *Kordić* (Appeals Judgment) (n. 43 above) §§ 527, 851, 854; *Muvunyi* (Appeals Judgment) (n. 44 above) § 84.

[46] *Brđanin* (Appeals Judgment) (n. 43 above) § 203; *Kordić* (Appeals Judgment) (n. 43 above) § 429; *Kvočka* (Appeals Judgment) (n. 40 above) §§ 332–334; *Prosecutor v. Naletilić and Martinović* (Appeals Judgment) IT-98-34-A (3 May 2006) §§ 169–170, 474; *Bikindi* (Appeals Judgment) (n. 44 above) §§ 172–178.

[47] *Prosecutor v. D. Milošević* (Appeals Judgment) IT-98-29/1-A (12 November 2009) §§ 270, 276; *Karera* (Appeals Judgment) (n. 44 above) § 185; *Simba* (Appeals Judgment) (n. 44 above) § 113; *Prosecutor v. Sesay and others* (Appeals Judgment) SCSL-04-15-A (26 October 2009) § 759.

[48] *Kordić* (Appeals Judgment) (n. 43 above) §§ 762, 865.

findings;[49] made findings that were inconsistent,[50] not clear enough,[51] or outside the indictment;[52] or drew conclusions not supported by the trial evidence,[53] or by the Trial Chamber's own findings.[54] In one case, the Appeals Chamber even concluded that the Trial Chamber 'seriously erred in its handling of the evidence'.[55]

The difficulties faced by Trial Chambers call for an appropriate judgment drafting methodology. It must allow the judges to master

[49] *Ibid*., at §§ 383–385, 453, 527–529, 601, 606, 612, 620, 891, 940; *Prosecutor v. Krajišnik* (Appeals Judgment) IT-00-39-A (17 March 2009) §§ 171–177; *Kupreškić* (Appeals Judgment) (n. 44 above) §§ 140–145, 223; *Kvočka* (Appeals Judgment) (n. 40 above) §§ 69–75; *Prosecutor v. Orić* (Appeals Judgment) IT-03-68-A (3 July 2008) §§ 32–61; *Prosecutor v. Bagosora and Nsengiyumva* (Appeals Judgment) ICTR-98-41-A (14 December 2011) §§ 397, 510, 681; *Renzaho* (Appeals Judgment) (n. 43 above) § 320; *Prosecutor v. Setako* (Appeals Judgment) ICTR-04-81-A (28 September 2011) §§ 256, 268; *Simba* (Appeals Judgment) (n. 44 above) § 154.

[50] *Naletilić* (Appeals Judgment) (n. 46 above) § 211; *Prosecutor v. Vasiljević* (Appeals Judgment) IT-98-32-A (25 February 2004) § 57; *Nchamihigo* (Appeals Judgment) (n. 43 above) §§ 306–308, 312; *Renzaho* (Appeals Judgment) (n. 43 above) § 509.

[51] *Kordić* (Appeals Judgment) (n. 43 above) §§ 154, 843–844, 891, 903; *Simba* (Appeals Judgment) (n. 44 above) §§ 153–155; *Sesay* (Appeals Judgment) (n. 47 above) § 463.

[52] *Kordić* (Appeals Judgment) (n. 43 above) §§ 901, 904, 1027–1028; *Bagosora* (Appeals Judgment) (n. 49 above) §§ 727–728.

[53] *Blaškić* (Appeals Judgment) (n. 43 above) §§ 333–335; *Brđanin* (Appeals Judgment) (n. 43 above) §§ 141–142; *Kordić* (Appeals Judgment) (n. 43 above) §§ 450–471, 489, 493, 497, 501, 517–518, 522–524, 540–541, 547, 550–551, 581–582, 595–599, 851–859, 896–899, 912–920, 922–926, 930–931, 935–939; *Prosecutor v. Krstić* (Appeals Judgment) IT-98-33-A (19 April 2004) §§ 65–70; *Kupreškić* (Appeals Judgment) (n. 44 above) § 243; *D. Milošević* (Appeals Judgment) (n. 47 above) § 207; *Prosecutor v. Strugar* (Appeals Judgment) IT-01-42-A (17 July 2008) § 69; *Vasiljević* (Appeals Judgment) (n. 50 above) §§ 46–53, 57; *Bagosora* (Appeals Judgment) (n. 49 above) §§ 312, 481, 519, 608, 669; *Kalimanzira* (Appeals Judgment) (n. 43 above) §§ 177–186; *Muvunyi* (Appeals Judgment) (n. 44 above) §§ 81–87; *Nchamihigo* (Appeals Judgment) (n. 43 above) §§ 78–83; *Ntakirutimana* (Appeals Judgment) (n. 43 above) §§ 349–354; *Rutaganda* (Appeals Judgment) (n. 43 above) §§ 494, 496, 500–502; *Zigiranyirazo* (Appeals Judgment) (n. 43 above) §§ 47, 50, 66–67, 72.

[54] *Blaškić* (Appeals Judgment) (n. 43 above) § 443; *Kordić* (Appeals Judgment) (n. 43 above) §§ 896–899, 924–926; *Vasiljević* (Appeals Judgment) (n. 50 above) § 57; *Bagosora* (Appeals Judgment) (n. 49 above) §§ 681, 705; *Nahimana* (Appeals Judgment) (n. 43 above) §§ 504–505.

[55] *Zigiranyirazo* (Appeals Judgment) (n. 43 above) § 75. Perhaps the most notable problem identified by the Appeals Chamber was that the Trial Chamber did not address the feasibility of the accused travelling between various locations at which he was identified to have been present on the same day. See e.g. *ibid*., §§ 44–46.

the evidence and issue a just and solid judgment without undue delay. What general methodology should a Trial Chamber adopt to achieve that goal?

2.2 *Implications for Drafting International Criminal Judgments*

The challenges outlined above lead to three main conclusions. First, one should adopt a bottom-up approach to judgment drafting. Second, one should start processing the evidence at the outset of the trial, and continue doing so throughout the trial. Third, one should choose an appropriate form of processing the evidence.

2.2.1 *Bottom-Up Judgment Drafting*

Bottom-up judgment drafting means to start by processing all the evidence, then drawing factual conclusions followed by legal conclusions issue by issue, culminating in the ultimate decision on the guilt or innocence of the accused. Top-down judgment drafting, by comparison, would mean that the judges, upon hearing all the evidence, decide on ultimate issues, notably the guilt or innocence of the accused, thereby setting a direction in which the judgment can be drafted down to its details.

Top-down judgment drafting is, as a rule, not advisable in lengthy and complex international criminal cases. The judges would need to wait until all evidence is admitted before making decisions on ultimate issues. Even then, the judges would most likely not have sufficient information to safely make such decisions. Key insights might be gained from closely analysing and comparing evidence that was admitted months or even years apart. Personal notes or memory of the evidence will not suffice in the face of so much evidence received at a high pace over a long period.[56] The legal assistants would only be able to provide limited help in this regard, as they are often involved in activities other than listening to on-going testimony and usually do not have as good an overview of the evidence as the judges. In addition, their expertise in the evidence of certain witnesses or exhibits may be lost if they leave the Trial Chamber before the judgment is issued. Finally, there is a risk that too much drafting would remain to be done at a very late stage of the proceedings, causing delays.

In light of these difficulties, bottom-up judgment drafting is usually the best way to proceed in complex international criminal trials.

[56] Murphy (n. 7 above) 551–552; Wald (n. 32 above) 771–772.

Legal assistants can incrementally process the evidence in a way that will benefit the Trial Chamber even if the assistants later leave the drafting team. It will be possible to divide the processed evidence into topics and examine it in a logical order. Typically, the Trial Chamber will first check that the requirements for the exercise of its jurisdiction are met, then examine whether the alleged crime incidents on the ground have been proven, and if so it will decide whether the accused are criminally liable for them. Gathering all the relevant evidence in a digestible form also allows the judges to recall and master it without being unduly influenced by the stage at which it was admitted or the vagaries of memory. It eliminates the risk of relying on general, unsafe impressions as a basis for decisions on key issues of the case.[57] In order to work, this approach requires continuous processing of the incoming evidence.

2.2.2 *Continuous Processing of the Evidence*

The Trial Chamber must start processing the evidence at the outset of the trial, and continue doing so throughout its duration.[58] This ensures that as little evidence as possible remains unprocessed at the close of evidence, at which point the Trial Chamber can focus its energies on the judgment. The time gained between the close of evidence and the delivery of the judgment helps reduce the risk of undue delays and safeguards the fairness of the trial.[59] In particular, it limits the time that the accused may have to spend in detention while being presumed innocent.[60] Furthermore, it constitutes an efficient use of the budget and the human resources of the tribunal or court.

Another reason to start early is that the Trial Chamber may need to carefully process parts of the evidence prior to the end of the trial. An obvious example of this is if, at the end of the prosecution's case, the defence requests the Trial Chamber to dismiss the case, or part of it, due to insufficient evidence having been presented.[61] The Trial Chamber will save precious time if it has already processed significant parts of the evidence. It will also be in a better position to put

[57] Proceeding on the basis of such impressions could e.g. lead to a questionable conviction under a malleable mode of liability such as joint criminal enterprise. See Combs (n. 6 above) in particular at 272, 337–338.

[58] *ICTY Manual* (n. 1 above) 109, 122.

[59] *Ibid.*

[60] Art. 66 ICCSt.; Art. 21(3) ICTYSt.; Art. 20(3) ICTRSt.; Art. 17(3) SCSLSt; Art. 16(3)(c) STLSt.; Rule 21(1)(d) ECCC RPE.

[61] See, e.g., Rule 98*bis* ICTY RPE.

questions to witnesses. In particular, the processed evidence will greatly facilitate its decisions regarding whether to call Chamber witnesses, whom to call, and what to ask them.

The parties' final written and oral submissions are not a viable alternative to the Trial Chamber's continuous processing of the evidence. One problem is that the submissions are unlikely to be sufficiently exhaustive and well-referenced. Each party will point to the bits and pieces of evidence most favourable to its side, thereby obscuring much of the evidence. For instance, the submissions may well refer to a particular statement by a witness, without referring to a later statement of his on the same topic that significantly qualifies the previous statement. If the Trial Chamber only relies on the first statement, it relies on a distorted version of the evidence as a whole. Another key problem is that the final submissions come much too late. By relying on them as a substitute for processing the evidence, the Trial Chamber would leave too much of its work to a late stage of the trial, thereby considerably delaying the judgment.

2.2.3 *Choosing the Right Form of Processing the Evidence*

One possible method of processing the evidence is to use trial management software to electronically mark certain transcript references and exhibits as relevant to certain issues, and to search the evidence for key words.[62] On its own, this method would be insufficient. Many links between different parts of the evidence can only be made through careful, detailed and intelligent analysis, and much of the evidence is relevant to a number of different issues. Key word searches would invariably overlook some relevant evidence. Electronic markings would either be bewilderingly dense and numerous, or insufficiently detailed to catch all the potentially important aspects of the evidence. Even assuming that this method could work, it would depend on extremely comprehensive and reliable electronic markings, which would need to be checked. After that, all actual drafting would remain to be done. This method would therefore swallow considerable resources before resulting in any text that could be used for deliberations or the judgment. That, in turn, would cause delays.

Rather than relying on just trial management software, one could consider gradually creating some form of organized written overview of the evidence, sorted by topics.[63] The Trial Chamber could then assign each topic to a drafter who, using the overview as a reference

[62] *ICTY Manual* (n. 1 above) 117–118.

[63] See *ibid.*, at 118.

tool, would become well versed in the relevant evidence and draft a succinct factual judgement section. The drafter would begin his work as soon as possible, but finish only after all evidence on the given topic has been admitted.[64] However, it would take a lot of resources to ensure that the overview becomes a reliable guide to the evidence. In addition, it would be necessary to repeatedly check that each judgment section is on track in terms of content and quality, so as to avoid unpleasant surprises when it is too late to do anything about it. Even so, it would be difficult to catch all the fine details in the evidence that can turn out to be significant for the judicial analysis.[65] A great amount of coordination would be necessary to ensure that the same evidence would not be inconsistently treated in different sections. In addition, for the topics on which much evidence is admitted the drafting task would become very daunting and time-consuming. If the main drafter leaves the drafting team before the chapter is finalized, it would be very difficult for someone else to carry it to its fruition.

In light of the difficulties outlined above, it is submitted that the best method is to summarize the evidence in portions, as a first step towards drafting the judgment.[66] One should invest the time and energy necessary to ensure that such summaries are of a very high level of quality, in terms of both form and substance. All judges and legal assistants can then trust that the summaries provide a reliable restatement of the evidence received, and refer quickly and with confidence to certain details of it. The summaries can be used as the building blocks of the judgment, and factual and legal findings can be safely made on their basis. The time and energy spent on marking and searching the electronic record of the evidence or creating written overviews of the evidence can be minimized or even eliminated. The final submissions of the parties become mainly a checklist of evidence and arguments that the Trial Chamber should consider, allowing it to be satisfied that it has not overlooked anything important. All of this saves time. The approach also has drawbacks, but they are manageable and will be addressed in the following section.

[64] One could, for instance, use the parties' summaries of the evidence they intend to call in order to anticipate when all evidence on a given topic has been received.

[65] This is especially the case if all the testimony and relevant exhibits of a given witness are not processed together – see Sect. 3.1.2 below.

[66] *ICTY Manual* (n. 1 above) 116–117.

III PRACTICAL RECOMMENDATIONS

Many aspects of processing evidence and drafting judgments are very practical, mostly common sense, and not suitable for theoretical discussion. Two general topics are worth discussing here – the optimal way to summarize the evidence, and how to use that as building blocks for the judgment.

3.1 *How to Summarize the Evidence*

To summarize the evidence one must first establish the structure in which to organize it. One must then divide the evidence into distinct and manageable portions and distribute them among drafters. Each drafter prepares a summary that retains from the portion of evidence all information potentially important for the judicial analysis, while eliminating as much unnecessary evidence as possible. All the drafting is done with a view to using the summarized evidence in the factual sections of the judgment.

3.1.1 *Create a Structure in Which to Organize the Evidence*

Since even succinctly drafted witness summaries can add up to a huge number of pages, it is important that the information within each summary is, as far as possible, sorted consistently under uniform headings.[67] This calls for a clear, logical and well-organized judgment structure into which the evidence can be sorted with relative ease. The judgment should be structured so that earlier chapters establish what will be needed for the analysis of later chapters.[68] The main headings can to a large extent be deduced from the indictment and the pre-trial briefs of the parties.[69] Experience shows that as the evidence is heard, it usually becomes necessary to add sub-headings or even adjust the main headings,[70] which unfortunately may create discrepancies with witness summaries finalized prior to the restructuring. However, it is

[67] *Ibid.*, at 116.

[68] *Ibid.*, at 110–115. In the trial judgments of the most complex cases one commonly finds factual chapters pertaining to the following: the background to the case; the existence of an armed conflict; the existence of a widespread or systematic attack directed against a civilian population; the alleged crimes on the ground; the role, position and powers of the accused; facts relevant to complex modes of liability; the acts and omissions of the accused; and sentencing. See also Boas et al. (n. 19 above) 387–388.

[69] *ICTY Manual* (n. 1 above) 109.

[70] *Ibid.*

precisely the careful processing of the evidence that, after a while, makes it clear what restructuring is necessary.

To allow for easy navigation of the summarized evidence, further guiding principles are necessary as to how to structure it within each heading. A good rule of thumb is to sort it chronologically (though not all evidence is sufficiently clear and precise to allow this), not only because it is a clear and natural way to structure information, but also because it can assist the Trial Chamber in drawing a number of conclusions. It may, for instance, make apparent that an alleged perpetrator only arrived at the scene of a crime after it had been committed. If the indictment covers a large geographical area, and is structured around different localities, it may also be a good idea to divide the evidence according to those localities. Depending on the complexity of the case, it may even be a good idea to divide the summaries according to alleged crime incidents.

However, evidence – and the reality it reflects – is too complex to always be neatly divided and structured according to these principles, so one has to maintain a flexible approach and accept exceptions when they are preferable. Imagine that a witness testifies about how, over a long period, various events, including killings and ill-treatment of family members, made it impossible for him to stay in his home, and that he went from one location to another until he finally had to leave the area altogether. That may be relevant to allegations of murder, cruel treatment and forcible transfer by deliberately creating an environment where the inhabitants have no other choice than to leave.[71] If the testimony is split between a chapter on murder and one on cruel treatment, the overall thrust of the story will be lost, along with much of its ability to support the allegation of forcible transfer. It may therefore be preferable to place the full story in the chapter on forcible transfer, and provide clear cross-references in the other chapters. For similar reasons, the story should not be broken up according to each locality through which the witness passed.

In situations where the same evidence is relevant for several chapters, one should never duplicate the same evidence under several headings. This would not only multiply the number of pages, but also open the door to a series of mistakes. First, one might end up analyzing the evidence inconsistently in different sections. Second, one might create inconsistencies by later modifying the summary in one location while forgetting to do so in other locations. Third, one might

[71] *Prosecutor v. Stakić* (Appeals Judgment) IT-97-24-A (22 March 2006) § 281.

consider the same event more than once as though there were separate events.

3.1.2 *Identify Distinct and Manageable Portions of Evidence to Summarize*

The only feasible way to process a huge body of evidence is to first divide it into manageable parts. Each part must be sufficiently distinct from the rest of the evidence to allow for separate treatment. As a rule, the best solution is to summarize together the full testimony provided by one witness, in light of the judges' initial assessments of the importance of the evidence and the credibility and reliability of the witness.[72] It is usually not a good idea to combine in one summary the evidence of more than one witness. One exception may be if a witness is called solely to contest a certain part of the story told by another witness. Inversely, it is usually not wise to divide the testimony of one witness. A witness often returns to the same topic in various parts of his testimony. One should summarize all of his evidence together, in one go, in order not to miss some relevant parts,[73] or to have different persons go each through all of the evidence when drafting separate summaries. Some indicators of the reliability and credibility of the witness, such as troubling inconsistencies, may also be lost if all of his evidence is not summarized together.[74]

As for the exhibits tendered and admitted into evidence during the testimony of a witness, many are best summarized along with the testimony, while others can be transferred elsewhere.[75] One should keep with the testimony exhibits that can be woven into the summary and improve the Trial Chamber's understanding of the facts. This is for instance the case with prior witness statements admitted as written testimony, a witness's diary in which he or she recorded the events at the time, maps and photos of a crime scene described by a victim, or the military orders about which a commander testifies. Exhibits that can be removed are those that have little if anything to

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[72] *ICTY Manual* (n. 1 above) 116–118. It is wise to record the judges' opinions of the credibility and reliability of a witness shortly after testimony while it is still fresh in their minds. See PM Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal' (2002) 5 Yale Human Rights & Development Law Journal 217, at 238.

[73] Compare with *Naletilić* (Appeals Judgment) (n. 46 above) § 474.

[74] Compare with *Kupreškić* (Appeals Judgment) (n. 44 above) §§ 222–225. See also Wald (n. 72 above) 238.

[75] *ICTY Manual* (n. 1 above) 116.

do with the testimony, and do not fit in the summary of that testimony. A common example of this is when a witness is shown a document and testifies that he knows nothing about it.

Exhibits that are removed from the scope of the summary can be placed in a well-organized pool of exhibits,[76] to be summarized separately or together with the evidence of another witness who has something helpful to say about the exhibit.[77] One should, of course, keep careful track of the transfers, so that no exhibits are inadvertently forgotten. The transfer of exhibits from one summary to another may have the further advantage of enabling the Trial Chamber to summarize all exhibits of the same type at the same time and according to the same uniform approach. If, for instance, many autopsy reports of a standardized format are admitted into evidence, one could save time and ensure consistent treatment by summarizing them all in one go. Finally, removing some exhibits from the scope of a heavy witness summary may have the added benefit of making it more digestible.

3.1.3 *Include All Evidence Potentially Important for the Judicial Analysis*

The Trial Chamber should include in the summary anything that may be important for making judicial findings. The foremost example of this is precise information, to the extent available, about *who* did *what*, *when* and *where* (and, in case of perpetration of criminal acts, to *whom or what property)*.[78] One must look carefully for any circumstantial evidence that could turn out to be crucial in identifying, for instance, the affiliation of the perpetrators and of the victims.[79]

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[76] Such a pool will typically contain exhibits tendered independently of any witness testimony, as well as adjudicated or agreed facts.

[77] Occasionally, it may even be preferable not to summarize an exhibit at all, though it contains important information. For instance, a map or a population census may be more helpful as a reference tool and in any event difficult to summarize.

[78] See Combs (n. 6 above) 22–44. For examples of the importance of the *when* question, see *Kvočka* (Appeals Judgment) (n. 40 above) §§ 333–334; *Naletilić* (Appeals Judgment) (n. 46 above) §§ 169–170; *Sesay* (Appeals Judgment) (n. 47 above) § 631. For the *who* question, see *Muhimana* (Appeals Judgment) (n. 43 above) §§ 51–52. For the *where* question, see *Kordić* (Appeals Judgment) (n. 43 above) §§ 903–904. For combined *where* and *when* questions, see *Zigiranyirazo* (Appeals Judgment) (n. 43 above) §§ 44–46.

[79] If certain important information is confidential, such as the identity of a victim who testified as a protected witness, it should be included in a specially formatted note designed to be deleted before the judgment is finalized. See *ICTY Manual*

Including such information with great precision also serves the purpose of connecting different portions of evidence, perhaps received several months or years apart, but relating to the same specific event. This ensures that the Trial Chamber will consider all the relevant evidence together. It will also uncover duplicative evidence. One may, for instance, discover that two witnesses in fact testified about the same murder, or that the same document was admitted into evidence more than once, under different exhibit numbers.

Also crucial for making judicial findings is contextual information that affects the probative value of the evidence. It should be included to ensure that it will be considered when that evidence is later assessed and compared to other evidence, as well as to show that the Trial Chamber took it into account. The source of knowledge of the witness should thus be systematically included, implicitly or explicitly, as it could for instance reveal that an eye-witness was contradicted by someone who merely heard about the event. Similarly, information about an exhibit such as its date, nature, source and author can be crucial to determine its probative value. One should also incorporate into the summary significant weaknesses in the evidence, for instance when a witness is suddenly unsure, hesitant, evasive, confused or suspiciously contradicts himself.[80] The inclusion of such information also helps counteract the fact that witness summaries generally appear more convincing than the messier source evidence, which in turn limits the risk that the judgment will end up giving too much weight to weak evidence.[81]

When preparing a witness summary, one should include potentially important evidence even if it appears to be fatally incomplete. It may, for instance, lack information about the identity of the perpetrator or the witness's source of knowledge. However, this evidence should still be included because evidence from other sources may provide the missing information that will determine whether or not the incomplete evidence is ultimately significant for the judgment. A summary should therefore include anything that is sufficiently

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Footnote 79 continued
(n. 1 above) 123. If in the end this evidence forms the basis of judicial findings, the judgment should indicate that there is a confidential basis so as to not appear arbitrary.

[80] See Combs (n. 6 above) 189–223.

[81] In *Bikindi* (Appeals Judgment) (n. 44 above), the Appeals Chamber faulted the Trial Chamber for making findings based on evidence that was too weak to sustain them (at §§ 172–178).

strong and detailed to potentially be linked up with other evidence providing important missing information. Otherwise the incomplete evidence may either be overlooked or later need to be laboriously dug out of the rest of the evidence. What can and should be excluded from the summary is any information that is so general, vague or weak that it could never be reliably linked to other evidence.

3.1.4 *Condense Summaries to a Manageable Size*

A witness summary should be as clear and succinct as possible, providing nothing more than may be needed from the evidence. The practice of admitting a witness's prior statements into evidence and submitting him to direct examination, cross-examination, re-examination and questions from the bench generally causes the testimony to be voluminous and repetitive. Even a very credible witness will typically be slightly inconsistent when repeatedly addressing the same matter. Related parts of the testimony should be identified, combined and succinctly reflected in the same part of the summary. Minor inconsistencies in how the witness expressed himself on the topic should be implicitly resolved by how the evidence is summarized.[82] This will go a great way towards making summaries succinct and manageable.

In addition, one can usually leave out certain kinds of evidence at little or no risk at all. This is notably the case with irrelevant information, which often comes into evidence when a witness provides unfocused testimony, or through the admission of exhibits only parts of which have any bearing on the indictment. One can evacuate a witness's opinions, speculations and conclusions, while focusing instead on any factual basis they may have.[83] Parts of contemporaneous exhibits that describe anticipated future events can usually be left out, unless they indicate criminal intent, a conspiracy or a plan. It is also often possible to eliminate evidence about what the witness says he or she does not know, and focus instead on what the witness *does* know.[84] An exception could be if a witness would have known

[82] See *Prosecutor v. Čelebići* (Appeals Judgment) IT-96-21-A (20 February 2001), § 497 ('Although the Trial Chamber made no reference in its findings to the alleged inconsistencies in the victim's testimony […], it may nevertheless be assumed that it regarded them as immaterial […].').

[83] On these types of evidence, see Wald (n. 72 above) 233–235. In *Muvunyi* (Appeals Judgment) (n. 44 above), the Appeals Chamber overturned a factual finding for which the only apparent supporting evidence was witness speculation (at § 84).

[84] In *Naletilić* (Appeals Judgment) (n. 46 above), the Appeals Chamber overturned the Trial Chamber's finding, based on the testimony of one witness, that a certain 'Zubac' was a subordinate of the defendant Martinović, because the witness had

about something if it had been true, because his lack of knowledge might show that it did not happen. However, as a rule, one can also cut out evidence about what did not happen, even if the witness has a proper source of knowledge, and focus instead on what *did* happen. It should nevertheless be included when the indictment alleges that the event did happen, or when it is otherwise significant that it did not happen. Of course, a witness's claim not to know about something, or that something did not happen, may be relevant to his credibility.

Weeding out evidence from summaries has to be done carefully, on a case-by-case basis. Where it is deemed to be useless, it should be left out. As a rule, it should also be omitted if it has only a marginal chance of being of some limited use. This amounts to taking a calculated risk. However, the risk is worth taking for the sake of achieving a manageable number of pages of summary, especially when balanced against the greater risk of overlooking something important because one is drowning in information.

3.1.5 *Prepare Summaries That Can Be Used in the Judgment*

One should create summaries that can be used in the judgment, so as to save precious time between the close of evidence and the delivery of the judgment. The summaries must therefore be drafted in a standardized way, both stylistically[85] and with regard to the level of detail they retain from the evidence. Most importantly, the Trial Chamber must be able to trust that the witness summaries are accurate. This calls for a rigorous system of quality control of the summaries, the exact contours of which depend on the available time and human resources. It could, for instance, involve pairing legal assistants with complementary skills into mini-teams in which one person carefully drafts a summary and the other carefully checks it, including whether it omits any evidence that should have been included. When both are satisfied with the quality of the draft they send it to a reviewer who checks it again, either sending it back to the drafting team for revision, or approving and sending it to the judges for their approval and perusal. A good quality control system is very demanding, so the Trial Chamber must choose wisely where to invest

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Footnote 84 continued
testified that he did not know to which unit Zubac belonged (at §§ 469, 474). The Trial Chamber did not need to focus on the witness's lack of knowledge, but rather on whether there was sufficient evidence that Zubac was a subordinate of Martinović.

[85] *ICTY Manual* (n. 1 above) 115, 124.

its limited resources. Realistically, it will have to assume, barring indications to the contrary, that the testimony was correctly transcribed, that translations are accurate, and that the parties will have brought to its attention any cultural information that significantly impacts on the interpretation of the evidence.[86]

Once a portion of evidence has been carefully summarized, the Trial Chamber should not spend its precious resources going back to the source material, except in certain limited circumstances. Notably, it may become necessary to revisit certain summaries that were drafted early on without the benefit of sufficient insight into the case. It may for instance happen that many documents of a certain type are admitted into evidence and summarized, and only later does a witness testify about how they have been created, by whom, and according to which methodology. This is very likely to affect the probative value of those documents and thus the optimal content of their summary. A partial remedy to this problem is to err on the side of over-inclusiveness in the early summaries, since it is easier to cut out parts than it is to go back through the evidence to see what was omitted.[87] With a well drafted summary, diving back into the evidence will not be too difficult. Indeed, it should be easy to identify which footnotes contain evidence that needs to be checked, and those footnotes will refer correctly and exhaustively to the relevant evidence. Further situations in which it is advisable to go back to check the source evidence can occur later during judgment drafting, and will be explored in the next section.

Given how resource-intensive it is to produce high-quality standardized witness summaries, a backlog of summaries is likely to grow. A partial remedy to this problem is to prioritize certain summaries based, in particular, on the judges' initial assessments of the importance of the testimony and the credibility and reliability of the witness. The determination of priorities may also be influenced by the stage of deliberations at which a summary is likely to be needed. If for instance the jurisdiction of the Trial Chamber depends on the

[86] On the problems of translation and cultural differences, see R Cryer, 'A Message from Elsewhere: Witnesses before International Criminal Tribunals' in P Roberts and M Redmayne (eds), *Innovations in Evidence and Proof – Integrating Theory, Research and Teaching* (Oxford: Hart Publishing, 2007) 381; P Roberts, 'Why International Criminal Evidence?' in P Roberts and M Redmayne (eds), *Innovations in Evidence and Proof – Integrating Theory, Research and Teaching* (Oxford: Hart Publishing, 2007) 347, at 371–378; Combs (n. 6 above) 63–105; *Prosecutor v. M. Nikolić* (Appeals Judgment) IT-02-60/1-A (8 March 2006), §§ 68–73.

[87] *ICTY Manual* (n. 1 above) 116.

existence of an armed conflict, it may wish to prioritize testimony dealing with that topic. A character witness called by the defence would be a lower priority, as it would mainly be useful for sentencing purposes, and then again only in case of a conviction. Documents that were not included in any witness summary can usually be left to the end, because they are relatively quick and easy to summarize, in full or in part, as necessary. Finally, if the judges find a witness to be so fundamentally unreliable that no part of his evidence is to be used, even for the purpose of comparing it with other related evidence, then there is no need to draft a summary at all. Prioritizing some summaries over others will prove precious in case it becomes necessary, as is virtually always the case in practice, to launch into judgment drafting before all summaries are completed.

3.2 *How to Use the Summaries for Judgment Drafting*

If the summarized evidence was properly sorted, it can be easily distributed among members of the Trial Chamber for drafting various judgment chapters.[88] Each chapter then goes through the successive stages of selecting the evidence to be used, structuring that evidence, and analysing it for the purpose of making judicial findings. The recommendations below focus on the most difficult scenario of chapters containing a lot of evidence.

3.2.1 *Selecting the Evidence*

The first question facing the drafter is what evidence is missing from his chapter, either because it is contained in another chapter or because it was not processed. If the recommendations above were followed, the bulk of the evidence should have been processed, including the most important parts. However, most likely some of it was not, in particular that of less important witnesses and documents not linked to any witness.[89] It is also very likely that some of the relevant evidence was sorted under other headings, because much evidence is relevant for more than one topic and it was deliberately not duplicated under multiple headings.[90]

[88] *Ibid.*, at 122–123.

[89] See Sect. 3.1.5 above. The Trial Chamber can continue to allocate some resources to further summarizing, but it will be high time to start turning the existing summaries into a judgment.

[90] See Sect. 3.1.1 above.

The drafter can find the missing evidence through the final submissions of the parties on the relevant topic, by checking what evidence they refer to,[91] and whether and where it has been summarized by the Trial Chamber. The final submissions provide a quick and fairly safe guide to documents that have not been summarized with any witness. The documents and parts of documents that are not cited by any parties are unlikely to make any significant difference in the judgment. As discussed above,[92] it is dangerous to use the final submissions as a short-cut to witness testimony and statements. However, if the witnesses whose evidence has not yet been summarized are the ones deemed least important by the judges, then there is little risk of missing out on something that would make a significant difference for the judgment.[93] The drafter, being well versed in the already summarized evidence, will be in a good position to determine what of the missing evidence is worth including. It is then transformed into summarized evidence, in accordance with the Trial Chamber's quality control procedure. It is necessary to supervise that the same evidence is not added to different chapters, leading to duplication and possible inconsistency. Similarly, when the final submissions of the parties lead the drafter to relevant evidence sorted under other chapters, he must find a way of referring to it, for instance by cross-references, without removing it from the other chapters or creating a risk of inconsistent treatment in different chapters.

The drafter must now choose what summarized evidence to exclude from the chapter, aiming to make it as succinct and readable as feasible. Fortunately, it is not necessary to refer to the testimony of

[91] This can also be an opportunity to discover errors in how the Trial Chamber summarized the evidence, in case the parties present it differently. However, since they may distort the evidence in favour of their own positions, one should be wary of endless and pointless verifications. One should also be extremely cautious about introducing modifications. A well drafted witness summary is a delicate edifice, where details in one sentence depend on other parts of the summary. At the time of drafting the summary, the drafter will have a deeper understanding of that evidence than the one who much later re-checks selected footnotes. Changes to the text made at that stage, when nobody remembers the minute details of the evidence, could easily do more harm than good.

[92] See Sect. 2.2.2 above.

[93] These practical recommendations should not be understood as an invitation to ignore significant parts of the evidence. The judges should have read and heard all the evidence, and determined the relative importance of different exhibits and witnesses. Their determinations inform the summarizing priorities.

every witness or every piece of evidence.[94] With the benefit of knowing all the evidence on the topic, the drafter can remove evidence that turns out to be unnecessary, for instance because there is a sufficient amount of better quality evidence supporting the same facts. One can also dispose forthwith of evidence that could have become helpful if paired up with complimentary evidence,[95] if the latter turns out to be missing. Summarized evidence on entire topics may be discarded depending on which direction the judgment takes, for instance if the Trial Chamber finds that it has no jurisdiction to consider them. It may seem wasteful to spend so much time and care summarizing evidence that ultimately will not be used in the judgment. However, the carefully drafted paragraphs that in the end are excluded from the judgment are part of an effort to ensure that the evidence is properly considered, and they help create the very insight into the case that will then allow the Trial Chamber to decide whether they should be included in the judgment or not.[96]

3.2.2 *Structuring the Evidence*

Once the evidence has been selected, the drafter possesses all the building blocks of the chapter. How to assemble them is quite specific to the amount and nature of the evidence. A limited volume of evidence has the advantage of obviating the need to further condense the information to keep the chapter within a manageable length. When different summaries are quite distinct from each other in terms of substantive content they can in general simply be put in a sequential order, linked together by sentences clarifying the structure. Where summaries overlap, the Trial Chamber may be able to rely on one that is particularly probative, detailed and useful, while merely noting in passing the corroborative evidence from other sources. If on the other hand two witnesses contradict each other, the respective summaries can be juxtaposed to plainly show the contradiction. For all these reasons, it is often possible to minimize the need to further merge the summarized evidence, and simply excerpt and place the previously prepared summaries in the clearest and best available order.

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[94] *Kvočka* (Appeals Judgment) (n. 40 above) § 23.

[95] See Sect. 3.1.3 above.

[96] The ultimate conclusion of the chapter should not dictate what evidence to exclude, in part because contrary evidence should be properly and explicitly considered and explained, and in part because the evidence should first be gathered and structured and only then can conclusions be properly drawn on its basis.

The main problem is when on a given topic there are many credible sources that partially overlap in content, and each contains some interesting parts not found elsewhere. If the corresponding summaries are all included as such in the judgment, it will become dense, repetitive and poorly structured. It is then preferable to merge them. Merging is a delicate process that requires new resource-consuming verification, which can however be kept to a minimum if individual footnoted sentences from the previous summaries are recycled as much as possible.[97] One might object to huge resources being invested in creating summaries that cannot after all be used for the judgment, since they have to be merged first. However, merging parts of summaries is still much easier and safer than trying to write the judgment based on numerous, repetitive and often lengthy testimonies without the support of well-drafted summaries.

While creating the backbone of a factual judgment chapter, as a rule it should not be necessary to re-check the source evidence.[98] However, there are in particular three exceptions when it may be advisable to do so. First, when different summaries require extensive merging on a given issue. Second, if a comparison of different witness summaries raises some new question or issue that calls for verifications of certain parts of a summary that was drafted without the understanding of the importance of that matter. Third, it is a good idea to re-verify the evidence underpinning bits of summary that the Trial Chamber finds to be crucial, as it turns to its analysis.

3.2.3 *Analysis*

Although preliminary work on the factual sections of the judgment began as soon as the first witness testified, the judicial analysis begins only once all the evidence on a given topic has been identified and properly processed. There are three important points of reference for the analysis. First, it must be based on what is in evidence.[99] Second,

[97] It is important to compare the old and the new summaries, since a sentence often loses some of its informative value when taken out of its context. A common example of this is when the first sentence of a paragraph provides the time and place of an event, and all ensuing sentences implicitly refer back to that time and place.

[98] See Sect. 3.1.5 above.

[99] Art. 74(2) ICCSt. In *Kordić* (Appeals Judgment) (n. 43 above), the Appeals Chamber found that the Trial Chamber had relied on documents that were not in evidence (at §§ 762, 865).

it must remain within the confines of the indictment.[100] Third, one should consider the arguments contained in the final submissions of the parties, and decide which ones need to be explicitly addressed. Most of the factual arguments will be implicitly dealt with merely by how the Trial Chamber summarized the evidence. Some arguments will likely be so far-fetched or half-baked that they do not deserve explicit consideration. Fortunately, the Trial Chamber is not obliged to give a detailed answer to every argument.[101] However, some arguments call for explicit treatment either because of their relative merit, whether or not they ultimately prevail, or because they would entail very significant consequences if they were to prevail.[102] Arguments contesting jurisdiction generally fall under either of these two categories. Any argument that is not addressed risks leaving the Appeals Chamber guessing as to why it was not.

With the benefit of the processed evidence and the confidence that it is accurate, it is possible to achieve a relatively high level of analytical sophistication without worrying too much about the reasoning being upended by surprises hiding in the evidence.[103] The Trial Chamber weighs and compares the evidence before it on each question to be determined, making final determinations as to its probative value.[104] The factors to take into consideration include any significant weaknesses or inconsistencies within a source of evidence,[105] the presence or absence of corroborating and contradictory

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[100] Art. 74(2) ICCSt. In *Kordić* (Appeals Judgment) (n. 43 above), the Appeals Chamber found that the Trial Chamber had held a defendant liable for acts that were not charged in the indictment (at §§ 1027–1028).

[101] *Kayishema and Ruzindana* (Appeals Judgment) ICTR-95-1-A (1 June 2001) § 165.

[102] In *Haradinaj* (Appeals Judgment) (n. 44 above), the Appeals Chamber found that the Trial Chamber erred in finding a witness credible without providing reasons or addressing the alleged inconsistencies in his testimony because the witness provided the principal evidence upon which an accused was convicted (at § 134).

[103] This illustrates how essential it is that the summaries are very precise and reliable, because any mistakes will taint the analysis of the evidence and possibly lead to mistaken conclusions. In *Nchamihigo* (Appeals Judgment) (n. 43 above), the Appeals Chamber reproached the Trial Chamber for basing a finding on the evidence of two witnesses when in fact only one of them supported it (at § 245).

[104] See Boas et al. (n. 19 above) 343–347.

[105] In *Muvunyi* (Appeals Judgment) (n. 44 above), the Appeals Chamber was 'particularly troubled by the numerous inconsistencies [between the testimonies of two witnesses] as to the core details relating to Muvunyi's alleged speech and by the utter lack of any discussion of these inconsistencies in the Trial Judgement' (at § 144).

evidence,[106] whether the evidence is direct or circumstantial,[107] whether it could be tested in cross-examination,[108] the credibility and reliability of witnesses or exhibits,[109] the source of information of each witness or piece of evidence,[110] whether a witness is a fact or expert witness,[111] and any blind spots in the evidence as a whole.[112] The Trial Chamber is not required to articulate every step of its reasoning,[113] but it should provide enough reasoning to allow the parties and the Appeals Chamber to understand the logic behind the Trial Chamber's evaluation of the evidence.[114]

This stage of the work of the Trial Chamber requires close coordination among judges and legal assistants. The judges deliberate, preferably in the presence of the drafter of the factual judgment section under consideration, and decide.[115] The clear separation between the summarizing of the evidence, on the one hand, and the analysis and conclusions that are based on it, on the other, allows the

[106] In *Simba* (Appeals Judgment) (n. 44 above), the Appeals Chamber found that the Trial Chamber's discussion was insufficient considering among other things the presence of contradictory or absence of corroborative evidence (at §§ 143, 155).

[107] In *Renzaho* (Appeals Judgment) (n. 43 above), the Appeals Chamber found that the Trial Chamber had relied on circumstantial evidence to find that the defendant ordered killings, but failed to explain how this was the only reasonable inference that could be drawn from the evidence (at §§ 316–319).

[108] In *Haraqija and Morina* (Appeals Judgment) IT-04-84-R77.4-A (23 July 2009) §§ 61–69, the Appeals Chamber found that the Trial Chamber, in convicting one of the accused, had erred by placing decisive weight on untested evidence emanating from the other accused.

[109] *Ntagerura and others* (Appeals Judgment) ICTR-99-46-A (7 July 2006) § 174.

[110] In *Kalimanzira* (Appeals Judgment) (n. 43 above), the Appeals Chamber found the Trial Chamber failed to address a witness's explanation for how he knew that certain homes had been destroyed (at § 183).

[111] In *Nahimana* (Appeals Judgment) (n. 43 above), the Appeals Chamber rejected a factual finding that was based solely on the testimony of an expert witness (at § 509).

[112] In *Naletilić* (Appeals Judgment) (n. 46 above), the Appeals Chamber found no evidence to sustain a finding that 'Zubac' was a subordinate of the defendant Martinović (at § 474).

[113] *Čelebići* (Appeals Judgment) (n. 82 above) § 481; *Sesay* (Appeals Judgment) (n. 47 above) §§ 345, 415.

[114] See Sect. 2.1.3 above. In *Kordić* (Appeals Judgment) (n. 43 above), the Appeals Chamber found that the obligation to provide a reasoned opinion meant that the Trial Chamber had to discuss all the constituent elements of a crime and assess the supporting evidence (at § 383).

[115] *ICTY Manual* (n. 1 above) 123–124.

judges to remain fully in control of the latter even if they delegated the former to their assistants. In case of disagreement between the judges, the drafting team may need to find the extra resources to prepare dissenting or concurring opinions. Drafters of different chapters also need to coordinate during this phase to ensure that the analysis contained in one chapter is consistent with that contained in others, especially when the analysis in one chapter relies on evidence included in another chapter.[116] The need for close coordination continues as the Trial Chamber begins to add findings to the chapters.

3.2.4 *Factual and Legal Findings*

Factual findings represent the Trial Chamber's opinion on what facts alleged in the indictment have been established, based on its analysis of the evidence and measured by the applicable standard of proof.[117] The Trial Chamber should explicitly and clearly state which specific alleged facts it finds to be proven.[118] It should provide sufficient clarity as to the evidentiary basis of each finding, so as to ensure transparent findings that hold up on appellate review.[119] Finally, it should apply the correct standard of proof. The *ad hoc* tribunals have developed a dual standard of proof. All factual findings underlying the elements of the crime or the form of responsibility alleged, as well as all those indispensable for a conviction, must be made beyond reasonable doubt.[120] By contrast, all other findings do not need to meet this high standard of proof.

This raises the question of what factual findings the Trial Chamber should make. One advantage of including summarized evidence in the judgment is that the Trial Chamber can, to a large extent, let the witnesses speak for themselves, and not necessarily take position on

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[116] In *Kordić* (Appeals Judgment) (n. 43 above) §§ 843–846, and *Vasiljević* (Appeals Judgment) (n. 50 above) § 57, the Appeals Chamber addressed inconsistent or contradictory findings in different chapters of the trial judgment.

[117] See *Ntagerura* (Appeals Judgment) (n. 109 above) § 174.

[118] *Kordić* (Appeals Judgment) (n. 43 above) §§ 384–385, 891.

[119] *Halilović* (Appeals Judgment) (n. 39 above) §§ 122–123; *ICTY Manual* (n. 1 above) 112. In *Kordić* (Appeals Judgment) (n. 43 above), the Appeals Chamber overturned a factual finding for which the Trial Chamber had not cited any specific evidence (at §§ 851, 854–857, 859).

[120] *Halilović* (Appeals Judgment) (n. 39 above) §§ 125, 129; *Ntagerura* (Appeals Judgment) (n. 109 above) §§ 174–175. See also Art. 66(3) ICCSt.; Rule 87(A) ICTY RPE; Rule 87(A) ICTR RPE; Rule 87(A) SCSL RPE; Art. 16(3)(c) STLSt.; Rule 148 STL RPE; Rule 87(1) ECCC RPE.

every detail and every contested point. By making only those findings that are truly necessary, the Trial Chamber narrows the field of potential mistakes. What it must make findings on are the alleged facts that are essential to the determination of guilt on a particular count.[121] This includes factual findings on each element of each alleged crime,[122] as well as each element of the mode of responsibility under which an accused is to be held liable.[123]

Assuming that all jurisdictional challenges have been disposed of, the Trial Chamber should first make those factual findings that together will determine whether an alleged crime was committed. These factual findings may need to include time, location, identity or affiliation of perpetrators, their acts including indicia of their state of mind, identity or affiliation of victims, their possible combat-related activities, military use of attacked buildings, the direction from which an artillery shell was fired, etc. Having made the necessary factual findings, the Trial Chamber can proceed to make legal findings on the crimes, by examining whether the factual findings prove each element of the alleged crimes beyond a reasonable doubt.

Next, the Trial Chamber should address the liability of the accused. Again, it begins by making factual findings – in this case those underpinning the modes of liability alleged against the accused. This could for instance involve determining what powers the accused had, whether the accused had any subordinates, whether any such subordinates committed any crimes, whether the accused learned about any such crimes, and if so how the accused reacted to that. The Trial Chamber then applies the law to the factual findings, and makes legal findings on each element of the alleged mode of liability to determine whether it has been proven beyond reasonable doubt.[124] The Trial Chamber must decide separately on each charge of the

[121] *Hadžihasanović* (Appeals Judgment) (n. 38 above) § 13; *Sesay* (Appeals Judgment) (n. 47 above) §§ 345, 415.

[122] *Kajelijeli* (Appeals Judgment) ICTR-98-44A-A (23 May 2005), § 60; *ICTY Manual* (n. 1 above) 119–120. In *Kordić* (Appeals Judgment) (n. 43 above), the Appeals Chamber faulted the Trial Chamber for not making specific and explicit factual findings with regard to each element of the crimes (at §§ 384–385).

[123] *Ntagerura* (Appeals Judgment) (n. 109 above) § 174; *ICTY Manual* (n. 1 above) 120. In *Orić* (Appeals Judgment) (n. 49 above), the Appeals Chamber reversed Orić's conviction because the Trial Chamber had not made factual findings on key aspects of his alleged criminal liability (at §§ 35, 38–39, 47–48, 52, 56–57, 59–61).

[124] *Ntagerura* (Appeals Judgment) (n. 109 above) § 174.

indictment, and separately on the charges against each accused.[125] If any accused are found liable on any charge, the Trial Chamber proceeds to convict them and, ultimately, determines appropriate sentences.[126] If not, the Trial Chamber acquits them.

IV CONCLUSION

The process of making factual and legal findings, and determining whether the accused are guilty or innocent, will be much less time-consuming, painful and fraught with peril if the Trial Chamber chooses wisely its approach to processing the evidence. By drafting, from the outset of the trial, a series of high-quality witness summaries, the Trial Chamber creates and maintains a reliable restatement of the evidence that greatly facilitates and accelerates the judicial analysis. It can use them to form the backbone of the judgment. For each question to be determined, relevant parts of summaries can be compared and analysed without drowning in the sheer volume of evidence. By basing legal findings on factual findings that are in turn solidly based on specific evidence, the Trial Chamber can achieve a high quality of judicial reasoning while also providing essential transparency on appeal. A number of pitfalls can be largely or entirely avoided, such as mischaracterizing or overlooking relevant evidence, or presenting an incomplete or overly simplified version of the evidence.[127]

It is however important to recognize that selecting an abstract approach to judgment drafting will never in itself solve all problems. It is necessary to adapt one's approach to the concrete situation. Every criminal case is different and every Trial Chamber has its own dynamics, resources, strengths and weaknesses. Whichever approach is chosen, it will in practice be peppered with different *ad hoc* solutions. No approach will work without a drafting team that is sufficiently meticulous, attentive to detail and shades of meaning, and capable of sophisticated factual and legal analysis.

This article has dealt with a matter that is very technical, but also very important, in particular given the consequences for the just and

[125] Rule 142(2) ICC RPE; Rule 87(B) ICTY RPE; Rule 87(B) ICTR RPE; Rule 87(B) SCSL RPE; Rule 148(B) STL RPE.

[126] Art. 76(1) ICCSt.; Rule 87(C) ICTY RPE; Rule 87(C) ICTR RPE; Rule 87(C) SCSL RPE; Rule 171(D) STL RPE; Art. 39 ECCCSt.

[127] See Combs (n. 6 above) 179–185.

solid outcome of international criminal trial judgments. The solutions proposed are not perfect, but they are based on years of ICTY experience. They take into account real-life constraints including limited time and resources. Hopefully they will spark a debate, leading to improvement in the practices of processing evidence and judgment drafting in Trial Chambers in international criminal courts and tribunals.